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Supreme Court of the United States

OCTOBER TERM, 1977

Docket No. 77-444

PENN CENTRAL TRANSPORTATION COMPANY, et al.,

Appellants,

v.

THE CITY OF NEW YORK, et al.,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

**MOTION FOR LEAVE TO FILE AND BRIEF OF THE
COMMITTEE TO SAVE GRAND CENTRAL STATION, ET AL.,
AMICI CURIAE IN SUPPORT OF THE CITY OF
NEW YORK, ET AL., APPELLEES**

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Pursuant to Supreme Court
Rule 42(3), the Committee to Save
Grand Central, the Municipal Art
Society of New York, The American
Institute of Architects and the

other organizations listed on the schedule
annexed to the attached brief as Exhibit
A, hereby respectfully move for leave to
file the attached brief as amici curiae
in support of the City of New York, et al.,
appellees. Counsel for appellees have
consented to the filing of this brief.
Counsel for appellants have not consented.

Interests of Amici

The Committee and the other
participants in such brief amicus move
to submit it because this proceeding
addresses at least two questions of the
utmost significance to them: first,
whether New York City can protect one
of the landmark buildings most important
to its continuing identity and function
as a business and cultural capital of

international importance; and, second, whether New York City and other local governments across the nation can be permitted under the Constitution to devise reasonable regulations intended to protect the nation's cultural and historic heritage.

Participants with the Committee in this brief are organizations which have in the course of the last 85 years made the quality of New York's built environment their first concern and have, among other things, been instrumental in the design and enactment of New York's Zoning Resolution and Landmarks Preservation Law, the statutes in question in this proceeding. The Committee and other participants in this brief have participated as amici curiae in each of the proceedings below in this case.

They believe that a decision by this court based on the record of this case which would nevertheless reverse the New York appellate courts and find for appellants, would eviscerate the Landmarks Preservation Law, license the destruction of Grand Central Terminal and arrest perhaps once and for all the critical national effort now underway to find effective, practicable means to preserve our national heritage.

An evaluation of the extraordinary historic, cultural and economic importance of Grand Central Terminal is set forth in the brief of the City of New York, in the section "Background of the Case." Summaries of the interests of each of the participants in this

brief amicus are attached to the
attached brief as Exhibit A.

Because of the extraordinary
importance of this proceeding and because
of their interests in it, the Committee
and such other participants respectfully
request that this Court grant them leave to
file the attached brief.

Respectfully submitted,

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES.....	ii
PRELIMINARY STATEMENT.....	1
QUESTION PRESENTED.....	3
STATEMENT OF THE CASE.....	4
THE PROCEEDINGS BELOW.....	5
THE APPELLANTS' ARGUMENT.....	21
SUMMARY OF ARGUMENT.....	27
ARGUMENT.....	31
I. THE LANDMARKS PRESERVATION LAW IS A REGULATORY SCHEME UNDERTAKEN FOR A PROPER REGULATORY PURPOSE.....	31
II. REGULATORY SCHEMES LIKE THE LANDMARK PRESERVATION LAW ARE PROPER IN THEIR AP- PLICATION SO LONG AS THEY DO NOT UNREASONABLY RESTRICT THE USE OF THE REGULATED PROPERTY.....	39
A. The New York Appellate Courts Properly Approached the Question Presented as a Matter of Degree and Their Rulings With Respect to Appellant's Failure of Proof Were Not Unreasonable.....	42

	<u>Page</u>
B. Interpreted as an Argument With Respect to the Crucial Issue of the Degree of Hardship Appellants' Argument to this Court is Without Any Support in Authority and Offers no Reason to Reopen and Reverse the Determinations of the New York Appellate Courts.....	47
III. APPELLANTS ARE ENTITLED NEITHER TO COMPENSATION NOR TO DAMAGES EVEN IF THE LANDMARKS LAW AS APPLIED IS INVALID.....	55
CONCLUSION.....	57
EXHIBIT A.....	i

TABLE OF AUTHORITIES

CASES:

<u>Arverne Bay Constr. Co. v. Thatcher</u> , 278 N.Y. 222, 15 N.E.2d 587 (1938).....	43
<u>Benenson v. United States</u> , 548 F.2d 939 (Ct.Cl., 1977)...	36
<u>Berman v. Parker</u> , 348 U.S. 26 (1954).....	34

CASES: (cont'd)

<u>City of New Orleans v. Dukes</u> , 427 U.S. 297 (1976).....	34
<u>City of Santa Fe v. Gamble-Skogmo Inc.</u> , 73 N.M. 410 389 P.2d 13 (1964).....	36
<u>City of St. Paul v. Chicago, St. P., M.&O. Ry. Co.</u> , 413 F.2d 782 (8th Cir. 1969), cert. den., 396 U.S. 985 (1969).....	36
<u>Figarsky v. Historic District Commission of the City of Norwich</u> , 171 Conn. 198, 368 A.2d 163 (1976).....	35
<u>First Presbyterian Church of York v. City Council of the City of York</u> , 25 Pa.C. 154, 360 A.2d 257 (Commonwealth Ct. of Pa., 1976).....	35
<u>French Inv. Co. v. City of New York</u> , 39 N.Y.2d 587, 350 N.E.2d 587, 350 N.E.2d 381, app. diss. 429 U.S. 990 (1976).....	55-56
<u>Goldblatt v. Hempstead</u> , 369 U.S. 590 (1962).....	8, 41 44, 45
<u>Griggs v. Allegheny County</u> , 369 U.S. 84 (1962).....	53
<u>Lafayette Park Baptist Church v. Scott</u> , 553 S.W.2d 856 (Mo.Ct. of App., 1977).....	35

	<u>Page</u>
CASES: (cont'd)	
<u>Lutheran Church in Amer. v. City of New York</u> , 35 N.Y. 2d 121, 316 N.E.2d 305 (1974)...	43
<u>Lynch v. New York</u> , 293 U.S. 52...	48
<u>Maher v. City of New Orleans</u> , 516 F.2d 1051 (5th Cir. 1975) cert. den. 426 U.S. 905 (1976).....	34, 35, 44
<u>Matter of Trustees of Sailors' Snug Harbor v. Platt</u> , 29 A.D.2d, 288 N.Y.S.2d 314 (1st Dept., 1968).....	34, 43
<u>Modjeska Sign Studies, Inc. v. Berle</u> , N.Y.2d (December 21, 1977) (Slip Opinion).....	7
<u>Opinion of the Justices to Senate</u> , 333 Mass. 773, 128 N.E.2d 557 (1955).....	36
<u>Pennsylvania Coal Co. v. Mahon</u> , 260 U.S. 393 (1922).....	26, 39
<u>Rebman v. City of Springfield</u> , 111 Ill.App.2d 430, 250 N.E.2d 282 (1969).....	35-36
<u>Rice v. Sioux City Cemetary</u> , 349 U.S. 70 (1955).....	57-58

	<u>Page</u>
CASES: (cont'd)	
<u>The Monrosa v. Carbon Black, Inc.</u> , 359 U.S. 180 (1959).....	57
<u>Town of Deering ex rel. Bittenbender v. Tibbetts</u> , 105 N.H. 481, 202 A.2d 232 (1964).....	36
<u>United States v. Causby</u> , 328 U.S. 256 (1946).....	53
<u>Veling v. Ramsey</u> , 94 N.J.Sup. 459, 228 A.2d 873 (1967).....	55
<u>Vernon Park Realty v. City of Mount Vernon</u> , 307 N.Y. 493 121 N.E.2d 517 (1954).....	42-43
<u>Village of Belle Terre v. Boraas</u> , 416 U.S. 1 (1974)...	34, 37
STATUTES:	
<u>New York City Charter and Administrative Code</u> , Ch. 8-A.....	1
<u>N.Y. Gen. Municip. Law § 96-9</u> (McKinney Supp. 1974-75)....	31
<u>N.Y. Sess. Laws, Ch. 216</u> (McKinney 1956).....	31

	<u>Page</u>
STATUTES: (cont'd)	
Foreign Statutes	
Law of Dec. 31, 1913, Concerning Historic Monuments, 33 Annuaire Annuaire de Legislation Francaise 219 (1913).....	32
Town and Country Planning Act 1971, c. 78 [Gr.Brit.]....	32, 33
MISCELLANEOUS:	
Hardy, Holzman, Pfeiffer, "Saving Grand Central Terminal or The Future of Midtown Manhattan", 30 Journal of Architectural Education 17 (1976).....	6
J. Morrison, <u>Historic Preserva- tion Law</u> (1965) (Supp. 1972).	34
<u>New York Times</u> , January 29, 1978.....	6
Note, "Supreme Court Treat- ment of State Court Cases Exhibiting Ambiguous Grounds of Decision", 62 <u>Colum L. Rev.</u> 822 (1962).....	49

Preliminary Statement

This is an appeal from a decision of the New York Court of Appeals approving an application of New York City's Landmarks Preservation Law* to protect Grand Central Terminal from development plans which would have destroyed its character as one of New York's and the nation's most important landmarks.

The Court of Appeals approved that application when it unanimously affirmed the decision of the intermediate

* New York City Charter and Administrative Code, Ch. 8-A. The relevant portions thereof and of the New York City Zoning Resolution are set forth in the Appendix to the Jurisdictional Statement (JSA 76a-118a.)

appellate court, the Appellate Division, holding that the Landmarks Preservation Law in its application to the Terminal did not deprive appellants of their property without due process of law. The Appellate Division reached its decision, reversing the trial court, on the basis of its review of the factual record in which appellants had not met their burden of proving that the regulation unreasonably interfered with their use of their property.

The findings of fact entered by the Appellate Division are set forth in the Appendix to the Jurisdictional Statement (hereinafter cited as "JSA") at pp. 46a-50a. The opinion of the Appellate Division (JSA 27a) is reported at 50 A.D. 2d 265, 377 N.Y.S.

2d 20 (1st..Dept. 1975) and the opinion of the Court of Appeals (JSA 1a-15a) at 42 N.Y. 2d 324, 397 N.Y.S. 2d 914, 366 N.E. 2d 1271 (1977). The opinion of the Trial Term (JSA 51a-73a) is not officially reported.

Question Presented

May the appellants, owner and prospective developer of a landmark railroad terminal of national historic importance, having failed to prove that the landmark as regulated is incapable of earning them a reasonable economic return from the uses for which they maintain it and for which it is admirably adapted, nevertheless require public payment for so much of the additional value of the Terminal as they are unable to realize because a local preservation

regulation prevents them from exhausting its development potential?

Statement of the Case

In this appeal appellants attack rulings of the New York appellate courts which found in effect:

A. that Grand Central Terminal is a fully functional railroad terminal duly designated as a landmark of New York City in accordance with the provisions of the New York City Landmarks Preservation Law;

B. that on the basis of the factual record made by appellants in their attack on the constitutionality of the Landmarks Preservation Law as applied to the Terminal, the appellants had failed to meet their burden of proving

that the Terminal as regulated was incapable of earning them a reasonable economic return, even though that law prevents them from exhausting the development potential of the Terminal by erecting a 57 story speculative office tower directly above it.

The Proceedings Below

The facts on which these determinations were made are not in dispute in this appeal* and are set forth in the findings of fact made by the Appellate Division. In those findings of fact the Appellate Division reviewed the evidence of economic hardship presented by appellants in their

* Appellants and appellants' amicus, the Real Estate Board of New York, nevertheless make various representations with respect to the facts which

effort to show the unconstitutionality

(Footnote continued from previous page)

are not supported by the record. Notable among these is appellants' misleading assertion to this Court that Grand Central Terminal "is physically 'deteriorating at a substantial rate'" (Appellants' Brief 4). To the extent this statement is intended to represent the current situation of the Terminal, it is wrong as a matter of public record, in major part because of very substantial public investments in the Terminal. (N.Y. Times, January 29, 1978, P.D-25; Hardy, Holzman, Pfeiffer, "Saving Grand Central Terminal or The Future of Midtown Manhattan", 30 Journal of Architectural Education 17 (1976). Appellants also assert (Appellants' Brief 5) that "Penn Central was guaranteed at least \$3,000,000 per year" as rental for the office tower from the developer. The term "guaranteed" is a substantial overstatement. The developer, a subsidiary organized for the purpose of the office tower project did undertake to pay such a minimum rent -- but the record is devoid of any evidence that the developer had any financial resources to support this undertaking other than the hoped-for profits from the office tower. Appellants' amicus, the Real Estate Board of New York, premises its argument to this Court on the assertion that Penn Central was suffering losses on the Terminal. (Brief Amicus Curiae of the Real Estate Board of New York, 8 and Point I(a) 16-27.) This claim was expressly rejected by the Appellate Division. (JSA 25a-26a).

of the Landmarks Law and expressly found it insufficient.

To reach this determination the Appellate Division repeated a basic acknowledgment of

"the right, within proper limitations, of the State to place restrictions on the use to be made by an owner of his own property for the cultural and aesthetic benefit of the community." (JSA 23a).

It rejected the contrary suggestion of the trial judge that "any regulation of private property to protect landmark values constitutes a compensable taking" (JSA 23a) noting that such a rule would "eviscerate" the legislature's scheme (JSA 23a). Rather, it said the problem was one of deciding whether the law "as applied to [appellants] in this case, imposes such a burden as to constitute

a compensable taking" (JSA 23a), the burden of proving the necessary degree of hardship being on appellants.

The Appellate Division found the considerations to be taken into account in evaluating the effect of the statute in the decision of this Court in Goldblatt v. Hempstead, 369 U.S. 590 (1962). There this Court called for consideration of the relationship of the underlying legislation to the public good, the reasonableness of the regulation in achieving its end and the effect of the regulation on the economic viability of the parcel involved.

In applying these standards the Appellate Division found the appellants' evidence of hardship seriously deficient. Among other things, it

found that appellants still had the use of the Terminal for purposes essential to their railroad business and for which they continue to operate it--uses for which the Terminal in its regulated form is excellently adapted. Secondly, directly on the question of the economic viability of the Terminal as regulated, the court found the appellants' own "Statement of Revenues and Costs" seriously inadequate. In it, the court pointed out, appellants had improperly charged "huge cost items" to the Terminal without distinguishing costs properly attributed to the landmark from costs properly attributed to appellants' railroad operations generally. And, it pointed out, appellants had credited the Terminal only with income from concessions, imputing "no rental

value whatsoever . . . to the vast space in the terminal devoted to railroad purposes," spaces which had value to appellants and which could have value to others. In addition the court noted that they took no account of the additional economic value which had been preserved for them by provisions of the New York City Zoning Resolution which permitted them to use its potential for office development on adjacent sites also owned by them. It cited also the fact that they had not shown that the arrangements whereby the State of New York relieved them of all losses on certain of their railroad operations were anything but beneficial (JSA 25a).

The Court of Appeals unanimously affirmed these findings of fact

and the conclusions of law reached by the Appellate Division on the basis of them, namely, that appellants had not met their burden of proving that the Landmarks Law imposed on them an unconstitutional hardship.

The Court of Appeals at the very outset stated the problem as a matter of

"determining the scope of governmental power, within the Constitution, to preserve, without resorting to eminent domain, irreplaceable landmarks deemed to be of inestimable social or cultural significance." (JSA 1a)

The test of the scope of the regulatory power it found in the undisputed principle

"rooted in the Due Process Clause of the Constitution, that government may not, by regulation, deprive a property owner of all

reasonable return on his property." (JSA 1a)

In going on to focus on the difficult and complex determination of what constitutes a reasonable return under this test, the Court repeatedly noted that this was a case involving the Due Process clause, not a case involving an exercise of the power of eminent domain under the just compensation clause.* It then

* Appellants' restatement of the holding of the Court of Appeals (Appellants' Brief 12) is wrong. It ignores the distinction made by the Constitution and respected by the Court of Appeals between regulations which fail by reason of Due Process requirements and eminent domain takings which require just compensation. The Court of Appeals clearly said that it was not making rules for just compensation cases. Appellants' distortion of the holding of the Court of Appeals into an alleged "rule" concerning just compensation is apparently based on their desire to avoid the consequences of their failure of proof on the Due Process issue.

affirmed the order of the Appellate Division, finding that appellants had not been deprived of their property without due process. Contrasting the record before it with another case involving the Landmarks Law and a charitable property, it stated:

"there has been no showing that the property, owned not by a charitable enterprise but by an entity existing to make a profit, is incapable in its economic context of producing a reasonable return, even if its development is limited." (JSA 10a-11a)

Appellants' proof on the crucial issue now before this Court had failed.

In its opinion the Court of Appeals explored considerations additional to those relied on by the Appellate Division which it felt offered further ways to approach the difficult measurement

of degree and reasonableness which traditionally marked the boundary between permissible regulations and those which fail under Due Process standards. It did so for the first time confronting a statute which expressly called for an evaluation of the reasonableness of the return remaining available to an owner of a commercial property subject to preservation regulation. The property, Grand Central Terminal, is the magnificent physical centerpiece of a business enterprise of extraordinary complexity, the worth of which is extremely difficult to fix. Moreover the business enterprise is one which has over the years benefited from an extraordinary number of public financial supports -- ranging from city real estate tax abatements to the present lease arrangements whereby the

State of New York relieves appellants of losses from certain of their railroad operations -- supports which have been granted in recognition of the peculiar nature of the railroad as a necessary public service. Finally, and perhaps most significantly, the potential value to this business enterprise of the speculative office tower development proposed here is uniquely tied to the continued operation of the commuter railroads in the Terminal, an operation now completely dependent upon continued public subsidies.

Faced with these circumstances the Court of Appeals acknowledged the special quality of the case, as a matter of the particular building being regulated, of the statute which in this case regulates it and of the public service business

which owns and operates it. As it said, as much of this complex of issues as of the building itself, "Grand Central Terminal is no ordinary landmark." (JSA 7a)

In order properly to address the particular statute in question here, the Court of Appeals distinguished the purposes of the Landmarks Preservation Law from the purposes of zoning and other property regulations. It identified the Landmarks Preservation Law as a distinct public program with a purpose of its own, to regulate a separate kind of property having special public importance because of inherent cultural and historic values. Having thus recognized the differences between various kinds of property regulation, the Court held that all of them were subject to the same constitutional standard, namely, that such

regulation is proper so long as the owner is not deprived of "all reasonable return on his property." (JSA 1a)*

* As the Court of Appeals said in a subsequent case:

"Although the regulation of billboards presents a somewhat different problem than those previously encountered in French and Penn Central [the decision appealed from herein], the analytical framework developed in those cases is useful in resolving whether a landowner who has erected billboards on his property is deprived of the use of his property by a regulation prohibiting the maintenance of such billboards. Drawing upon this analysis, we are of the opinion that, regardless of whether a legislative pronouncement is denominated a zoning ordinance, a landmark regulation, or more broadly, as an exercise of the police power, the critical test of its constitutionality remains whether the challenged legislation deprived a property owner of all reasonable use of his property. To be distinguished, however, are instances of the exercise of the governmental power of eminent domain in which there is a true "taking" of the property." Modjeska Sign Studios, Inc. v. Berle, __ NY 2d __ (December 21, 1977) (slip opinion 5-6).

For a regulatory scheme with this purpose, the Court suggested three additional considerations which might be taken into account when measuring the effect of the regulation on appellants' very special business. Here it noted that it would be proper in computing the return left to them on the regulated landmark to take account of the value to appellants of the transferable development rights -- something, as found by the Appellate Division, they had left out of their accounting. It noted also the importance of Grand Central Terminal as a "flagship," drawing business to appellants' other properties, contributing returns which, if hard to quantify, are clearly not negligible. And it suggested, in an effort to take account both of the public character of the services which is the base

of the business and of appellants' private enterprise which has, with all the public supports, provided the service itself, that it would be proper to limit the base against which the property owners' return should be measured to a base related to his own "investment" in the enterprise, leaving out of the calculation what it called the "social investment" for which he cannot take credit. Thus returning to the basic question of fairness underlying this and all other property regulation cases, the court proposed to remove from such computation values which, if they were included, would materially distort it.

In discussing these issues the Court never suggested that they

underlay or should be seen to underlie the decision which it unanimously affirmed.* Rather, the Court of Appeals put these suggestions forward as additional considerations in support of the analysis made by the Appellate Division, but which would require for their actual application the development of facts not present in the record before it. On that record, the court said, "The result directed by the Appellate Division is correct."

(JSA 14a)

* Nor could they be seen to underlie it: for example, the "social investment" theory, requiring as it does a determination of the adequacy of a return when measured against an investment base from which social contributions are to be excluded, requires the prior determination of a fair statement of income and expense -- exactly the statement which the Appellate Division found appellants had not provided.

The Appellants' Argument

Appellants in this proceeding do not challenge the findings of fact affirmed by the Court of Appeals. Instead, to avoid the effect of their failure to prove, they now present an argument not advanced before the courts below, namely, that the "property" subject to the regulation is not the landmark building and the land on which it is located -- defined by the Landmarks Preservation Law as the "landmark site" or the "improvement parcel" -- but only the air space over it. Thus they subdivide their property so as to exclude the nub of the controversy settled by the Court's findings of fact below -- that they had failed to prove that the law unreasonably interferes with their use of the landmark. They then invite this Court to

embark with them on an unprecedented exploration of an extreme and extraordinary theory of law: that property regulations are invariably compensable "takings" to the extent of their diminution of the development potential of regulated land. This by their argument will always be true since the interest affected by a regulation can always be subdivided out as if it were a separate piece of property and then described, by their rationale, as having been "taken".

Appellants in fact dismiss as "immaterial" their failure of proof on the critical issue of return. (Appellants' Brief 8 Note 7). The failure of course becomes "immaterial" once one assumes with them the "taking" which they failed to prove. Furthermore, it can be seen as

"immaterial" only if one accepts appellants' premise that the Terminal's potential for speculative development can be evaluated in a vacuum without consideration of the return on the underlying land and building. By their argument, among other things, however handsome their return from the Terminal itself, they could always claim a taking of the air rights. Ultimately, their position, however clothed, is nothing more or less than a restatement of the rule - uniformly rejected by courts in property regulation cases - that landowners are constitutionally entitled to the highest and best use of their land.

Appellants also ignore the findings of both courts below that the

very same property interest they say has been "taken" -- that is, the potential of the Terminal for speculative office development -- has in fact not been wholly taken away from them and remains available to them, in substantial part at least, through the transfer of the development potential to nearby sites owned by Penn Central.

Appellants make their assumption of this "taking" in the course of a seriously misleading presentation of the decision of the Court of Appeals. Thus they assert the Court of Appeals to have held that landmarks, because they are landmarks, may be condemned without just compensation. (Appellants' Brief 12) This assertion is, among other things, nonsense. As has been noted, the Court

of Appeals carefully distinguished (as the Constitution requires) the Due Process problem before it from what would be appropriate in a condemnation case. In reducing the decision of the Court of Appeals to a rationalization of special statutory ill-treatment of landmark owners, appellants completely ignore what the Court of Appeals actually held. The issue addressed by the Court of Appeals was whether the application of the Landmarks Law was a proper exercise of the police power and did not deprive them of all reasonable use of their property. This is the central issue in this case and cannot simply be assumed away.

Disastrous consequences would follow if appellants' assumption of a "taking" here were accepted by this Court:

every single property regulation undertaken for any purpose whatsoever would carry with it a requirement that every single private property interest affected by the regulation be paid for by the regulating municipality -- and paid for on the basis of the highest speculative value that could possibly be assigned to it. If this were the case, as Mr. Justice Holmes said many years ago, "Government could hardly go on." Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 at 413 (1922). The attraction of this extreme position to appellants is obvious, but, as the argument will show, it is far from being the law of this land.

Summary of Argument

Property regulations for the purpose of preserving buildings of special historic, cultural or aesthetic importance constitute a proper exercise of the police powers and as such have been upheld in their application to individual properties so long as the regulations as applied do not deprive the landowner of all reasonable beneficial use of the property. This is true whether the landmark buildings are located in historic districts or identified throughout a city as a whole.

A party challenging the constitutionality of the regulation has the burden of showing that the regulation deprives him of all reasonable beneficial use of his property. The

finding of the courts below that appellants had not met this burden is essentially unchallenged and is clearly reasonable. The appellants' failure, among other things, to include in their proof regarding their return from the Terminal, any rental value for the vast space in the Terminal devoted to railroad purposes and the return which would have been available through transfer of development rights to nearby properties clearly made it impossible to determine the quantum of return - and accordingly any measurement of its reasonableness. This fundamental failure precludes any finding that the regulation as applied was unreasonable entirely apart from the additional considerations, such as the "social-investment" concept, cited by the Court of Appeals.

Appellants attempt to avoid the effect of this failure of proof by subdividing the property so as to treat the air rights as a property separate and distinct from the underlying Terminal. There is no support in reason or authority for this arbitrary and artificial subdivision which, if approved, would have catastrophic effects on all property regulation. The property which is regulated is the Terminal property as a whole and the fairness of the regulation must therefore be considered in the light of the return to its owner from the Terminal property as a whole.

The eminent domain cases cited by appellants which involve invasions of air space above a landowner's property

are irrelevant since they are based on physical intrusions into the owner's property in circumstances where there was no claim that the intrusion was justified as a proper exercise of the police power.

Argument

I THE LANDMARKS PRESERVATION
LAW IS A REGULATORY SCHEME
UNDERTAKEN FOR A PROPER
PUBLIC PURPOSE

New York City's Landmarks

Preservation Law was enacted in 1965, pursuant to New York State enabling legislation adopted in 1956 which declared preservation of landmark values to be the public policy of the State. N.Y. Sess. Laws, ch. 216 (McKinney 1956) repealed, amended and reenacted as N.Y. Gen. Munic. Law § 96-9 (McKinney Supp. 1974-75). The Landmarks Law provided a comprehensive scheme for the identification and protection of all the buildings and other features of special historic, cultural, aesthetic and other importance throughout the City which give the City its special character as a place to live,

work and visit. The City Council acknowledged in its enactment of the Law the importance to the "health, prosperity, safety and welfare" of the people of New York of the preservation of these buildings, paying particular attention to the cultural and economic harm which would follow if they were unnecessarily destroyed (JSA 76a).

In imposing protective regulations to protect these public values, New York City joined the nationwide -- indeed worldwide* -- movement for the protection of values of built

* In Great Britain comprehensive landmark preservation regulation is provided for in the Town and Country Planning Act, 1971, c. 78, Part IV; similarly France provided for such regulation in the Law of Dec. 31, 1913, Concerning Historic Monuments, 33 *Annuaire de Legislation Francaise* 219 (1913). Under

environments in cities which are crucial to their identity and continued vitality. In this effort, the City was careful to provide standards for relief which were intended to accord with basic Constitutional due process standards (Section 207-8.0, JSA 94a) and in no case has the validity of the New York law on its face been substantially challenged.

Regulatory schemes to protect

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the English statute where a property owner claims that with the designation of his building "the land cannot be rendered capable of reasonably beneficial use", that statute expressly stipulates that in determining whether a reasonable use survives, "no account shall be taken of any prospective use of that land which would involve the carrying out of new development". Town and Country Planning Act 1971, c. 78, s. 190(2).

public interests in the built environment are now legion.* Such schemes have frequently been upheld as proper exercises of the police power, among those upheld being many intended to protect values like those protected by the Landmarks Preservation Law. Berman v. Parker, 348 U.S. 26 (1954); Village of Belle Terre v. Boraas, 416 U.S. 1 (1974); Maher v. City of New Orleans, 516 F.2d 1051 (5th Cir. 1975) cert. den. 426 U.S. 905 (1976) City of New Orleans v. Dukes 427 U.S. 297 (1976). In cases such as these, legislative schemes to protect these values have been approved with express recognition that those values are as worthy objects of legislative action as

* J. Morrison, Historic Preservation Law (1965) (Supp. 1972).

any other public interests, being entitled to the same degree of police power protection as any other such objects.

Appellants make "no claim" that the preservation of buildings of historical or aesthetic importance is an impermissible objective of governmental action in pursuit of the public welfare (Appellants' Brief 12)*. Appellants appear to suggest (Appellants'

* As indeed they could not in the face of the many cases upholding landmarks preservation regulations. Maher v. City of New Orleans, 371 F. Supp. 653 (E.D. La., 1974), affd. 516 F. 2d 1051 (5th Cir., 1975), cert. den. 426 U.S. 905 (1976); Matter of Trustees of Sailors' Snug Harbor v. Platt, 29 AD 2d 376, 288 N.Y.S. 2d 314 (1st Dept., 1968); First Presbyterian Church of York v. City Council of the City of York, 25 Pa.C. 154, 360 A. 2d 257 (Commonwealth Ct. of Pa., 1976); Figarsky v. Historic District Commission of the City of Norwich, 171 Conn. 198, 368 A. 2d 163 (1976); Lafayette Park Baptist Church v. Scott, 553 S.W. 2d 856 (Mo. Ct. of App., 1977); Rebman v. City of Springfield,

Brief 22-23) that the power to protect landmarks extends only to landmarks located within historic districts. They do so by suggesting that the sole basis for upholding zoning restrictions and historic district restrictions is a supposed mutuality of benefit and burden to landowners within the particular area affected. Apart from the fact that such "mutuality" is more

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111 Ill App. 2d 430, 250 N.E. 2d 282 (1969); Opinion of the Justices to the Senate, 333 Mass. 773, 783, 128 N.E. 2d 557, 564 (1955); City of Santa Fe v. Gamble-Skogmo Inc., 73 N.M. 410, 389 P. 2d 13 (1964); Town of Deering ex rel. Bittenbender v. Tibbetts, 105 N.H. 481, 202 A. 2d 232 (1964). See also City of St. Paul v. Chicago, St. P., M.&O. Ry. Co., 413 F. 2d 762 (8th Cir., 1969), cert. den. 396 U.S. 985 (1969); Benenson v. United States, 548 F. 2d 939, 949 (Ct. Cl., 1977).

supposed than real - the argument avoids the determinative issue, which is whether the classification of buildings of landmark quality within a city as a whole "bears 'a rational relationship to a [permissible] state objective'". Village of Belle Terre v. Boraas, 416 U.S. 1, 8 (1974). The Court of Appeals held that the classification of individual landmarks here involved did bear such a rational relationship, stating:

"Discriminatory zoning is condemned because there is no acceptable reason for singling out one particular parcel for different and less favorable treatment. When landmark regulation is involved, there is such a reason: the cultural, architectural, historical, or social significance attached to the affected parcel." (JSA 6a)

Appellants do not, and indeed cannot,

challenge this finding.

Given this conceded propriety of objective, given the generality of interest expressed by federal, state and local legislatures in the protection of these values and given the general presumption of validity to be accorded to legislative schemes for public objectives generally recognized to be proper, the New York appellate courts clearly cannot be said to have been in error when they generally approved the Landmarks Preservation Law as legislation in support of which the full strength of the police power could be brought to bear. The question remains, then, whether they nevertheless erred when they found that the exercise of that power under the law, when examined

in its particular application to appellants' property, still did not offend against constitutional due process standards.

II. REGULATORY SCHEMES LIKE THE LANDMARKS PRESERVATION LAW ARE PROPER IN THEIR APPLICATION SO LONG AS THEY DO NOT UNREASONABLY RESTRICT THE USE OF THE REGULATED PROPERTY

The determination whether a property regulation proper in its purposes and otherwise valid on its face is nevertheless invalid as unconstitutional in its application has generally been formulated by this Court as a question of degree. Perhaps the classic recognition of this principle came in Pennsylvania Coal Co. v. Mahon in Mr. Justice Holmes' statement: "The

general rule at least is that while property may be regulated to a certain extent, if legislation goes too far it will be recognized as a taking." 260 U.S. 393, 415 (1922). That the question is a matter of degree has been frequently reaffirmed, the difficulty remaining in each case to determine how far is too far. As this Court has stated:

"There is no set formula to determine where regulation ends and taking begins. Although a comparison of values before and after is relevant, see Pennsylvania Coal Co. v. Mahon, supra, it is by no means conclusive, see Hadacheck v. Sebastian, supra, where a diminution in value from \$800,000 to \$60,000 was upheld. How far regulation may go before it becomes a taking we need not now decide, for there is no evidence in the present record which even remotely suggests that prohibition of further mining will reduce the value of the lot in question. Indulging in the usual presumption of constitutionality, infra, p. 596, we find no indication that the prohibitory effect of Ordinance No. 16 is sufficient to render it an

unconstitutional taking if it is otherwise a valid police regulation. (Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962)).

The question has remained a matter of reasonableness in the particular case, as the underlying concepts of fairness and due process perhaps make inevitable.

The "social investment" concept discussed by the Court of Appeals finds its relevance as a consideration which can be properly viewed in applying these broad constitutional requirements of fairness and reasonableness. Since, as noted infra, footnote at 20, the record as developed at the trial of this matter did not permit a concrete application of the concept, it is submitted that its constitutional validity need not, and

perhaps should not, be determined at this time.

A. The New York Appellate Courts Properly Approached the Question Presented as a Matter of Degree and Their Rulings With Respect to Appellants' Failure of Proof Were Not Unreasonable

Facing the question of the validity of an application of the Landmarks Law, the New York appellate courts approached the problem as a question of degree and reasonableness and did not err in so doing. In their experience with determinations of this sort under a variety of property regulations, the New York courts have invariably started with an effort to evaluate and measure the degree of hardship, working towards the formulation of an objective standard for how far is too far. See e.g., Vernon Park Realty v. City of Mount Vernon, 307 N.Y. 493

121 N.E. 2d 517 (1954); Arverne Bay Constr. Co. v. Thatcher, 278 N.Y. 222, 15 N.E. 2d 587 (1938). In cases specifically involving the Landmarks Preservation Law, the New York courts have made the same effort to measure the reasonableness of the hardship to the particular owner. Lutheran Church in Amer. v. City of New York, 35 N.Y. 2d 121, 316 N.E. 2d 305 (1974), Matter of Trustees of Sailors' Snug Harbor v. Platt, 29 A.D. 376, 288 N.Y.S. 2d 314 (1st Dept. 1968). In the instant case they again undertook to measure it against appellants' particular situation. The Appellate Division found that the appellants had failed to show what return the Terminal, as regulated was capable of yielding to its owner. The Court of Appeals

affirmed, suggesting considerations which would also support the result reached. What was fundamental to both courts' analyses was the search for the limits of fairness in the particular case, as required by the rulings of this Court.

This Court has always held that the party complaining of the regulation has the burden of proving that the particular regulation goes too far. Goldblatt v. Hempstead, 369 U.S. 590, 595-96 (1962); Maher v. City of New Orleans, 516 F.2d 1051, 1067 (5th Cir. 1975), cert. denied, 426 U.S. 905 (1976). The New York appellate courts likewise placed on appellants the burden of proof and, in so doing, cannot be

seen to have erred. Nor when they imposed that burden did they erect unreasonable standards of proof for appellants to meet.

A review of the judgment of the lower courts, and the enumeration on which it is based, shows it to be not unreasonable and far from arbitrary. Appellants' failure to take any account of any rental value for the use of "the vast space in the Terminal devoted to railroad purposes" (JSA 25a) goes to the heart of the case on the Terminal's economic value as a building. To insulate the calculation from the caprices and incompetence of particular owners, the court phrased the question as whether

the Terminal as regulated was "incapable" of earning its owners a reasonable return, not whether it was actually earning them one. As to that question, a computation which omits the rental value of the building is clearly incompetent as a matter of proof. This was not the only omission pointed out by the court, and the sum of them clearly supports the court's determination that appellants' burden of proof has not been met.

B. Interpreted as an Argument with Respect to the Crucial Issue of the Degree of Hardship, Appellants' Argument to this Court is Without Any Support in Authority and Offers no Reason to Reopen and Reverse the Determinations of the New York Appellate Courts

Appellants do not attack the decisions below on any of the grounds critical to the determination here -- which might alone be enough to require this Court to dismiss their appeal.*

* This Court dismissed certiorari as improvidently granted in a case also from the New York Court of Appeals, after oral argument before the Supreme Court, explaining that:

"[i]t is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for deci-

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Rather, they simply ask this Court to assume with them that their

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sion to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it.

[citations omitted] Where the judgment of the state court rests on two grounds, one involving a federal question and the other not, or if it does not appear upon which of two grounds the judgment was based and the ground independent of a federal question is sufficient in itself to sustain it, this Court will not take jurisdiction." (Emphasis supplied.) Lynch v. New York, 293 U.S. 52, 54-55 (1934).

This Court's prohibition against ruling upon hypothetical questions not necessarily raised in a record before it, constitutes a jurisdictional bar to this Court's determination of issues considered by the New York Court of Appeals but not necessary to the result reached.

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property has been taken because they have been prevented by the law from proceeding with one particular

(Cont'd from previous page)

"The Supreme Court's appellate jurisdiction over state court judgments is limited to review of federal questions necessary to the decision of the highest state court in which a decision could be had. Although commentators have differed as to the basis of the requirement that a question, to be reviewable, must have been necessary to the decision, the Court has indicated that it derives from the general prohibition against the rendering of advisory opinions and has applied it as a rigid jurisdictional restriction.

"Consequently, even if a federal question has been decided, Supreme Court review is barred if the state court's disposition was also based on a nonfederal ground that is, in the Court's view, independent of federal issues before the Court and adequate in itself to support the judgment." [footnotes omitted]. Note, Supreme Court Treatment of State Court Cases Exhibiting Ambiguous Grounds of Decision, 62 Colum.L.Rev. 822, 822 (1962).

development plan. Then they ask it to go on without argument to their further claim for compensation for this taking.

This conclusory allegation, if treated for the moment as an argument, can be regarded as an assertion concerning the question of degree of hardship: that their property has been excessively restricted by this regulation. But even viewed as an argument, the assertion is extraordinarily distorted by what it omits. First, it takes no account of the degree to which the development potential they seek to exploit, was and still is available to them on other sites, because of the development rights transfer arrangements made for them by the City. And, second -- and

most important -- it takes no account whatever of the return available to them from the Terminal in its regulated form.

This latter omission is the result of the subdivision they make of the property, asking this Court to evaluate this regulation not as it restricts the property which is the subject of the regulation that is, the Terminal, the underlying land and the rights appertaining thereto taken as a whole -- but as it applies to only a portion of the property the air space above it, as arbitrarily separated out by them. This subdivision is truly remarkable, flying as it does in the face of the legislative intent and omitting as it would the whole essence of the

conflict, namely, the evaluation of the remaining use of the regulated property, Grand Central Terminal. No authority whatever exists for an approach to regulation which would treat each interest in a property as a separate parcel, to be protected without regard to its relationship to the whole. The result of such an approach would of course be catastrophic, with even the mildest property regulation rendered absolutely prohibitive in cost.

At best, appellants' approach, treated still as if it were offered as a relevant argument, seems an ingenious effort to make a case for the constitutional protection of the highest and best use -- since what they assert is denied them is (at least from their point of view) the "highest

and best use" permitted by the zoning. However ingenious, the argument still does not create authority for a proposition which has not been held to have merit for many years. Goldblatt v. Town of Hempstead, New York, 369 U.S. 590, 592 (1962) The question remains the more difficult matter of degree -- how much restriction beyond the elimination of the highest and best use will still be permissible -- and appellants, by any interpretation of their argument, simply do not address it.

The eminent domain cases cited by appellants, such as Griggs v. Allegheny County, 369 U.S. 84 (1962) and United States v. Causby, 328 U.S. 256 (1946) are simply irrelevant. These cases all of which started from formal exercises of the power of

eminent domain in connection with public works, held only that physical intrusions into the air space above the landowner's property which prevent normal usage of the property constitute a compensable taking to the same extent as if land had been taken for use as runways. In these cases, it was assumed that compensation was payable if there was sufficient impact on the landowner. In the instant case, as in all cases of land use regulation for a proper police power objective, the issue is not whether there is an economic impact on the landowner but rather whether such impact is so great as to leave the landowner with no reasonable beneficial use of his property.

III. APPELLANTS ARE ENTITLED
NEITHER TO COMPENSATION
NOR TO DAMAGES EVEN IF
THE LANDMARKS LAW AS
APPLIED IS INVALID

There is no question that the City of New York, in enacting the Landmarks Preservation Law and applying it to Grand Central Terminal, acted in a good faith belief that it was properly exercising its police powers for a proper public purpose. If this Court were to hold -- as we respectfully submit it should not -- that this application of the Law is not a permissible exercise of the City's police powers it does not follow, as appellants contend, that appellants are entitled to compensation or damages. Velting v. Ramsey, 94 N.J.Sup. 459, 228 A.2d 873 (1967); French Inv. Co. v. City of New York, 39 N.Y.2d 587,

350 N.E.2d 381 (1976), app. dismiss.,
429 U.S. 990 (1976). (See also other
cases cited in Point II of the Brief
of the City of New York.)

To permit such a claim,
would place governmental bodies at
immense financial risk whenever they
in good faith undertook any property
regulation, the constitutionality of
which could be questioned. The de-
velopment of new laws to protect
emerging public interests would, as
a practical matter, be impossible.

CONCLUSION

On the basis of the forego-
ing and particularly given that the
factual question central to the de-
cisions below -- namely, appellants'
failure to meet their burden of
proof -- remains unchallenged any-
where here, it is clearly appropriate
that appellants' appeal now be dis-
missed on grounds that probable
jurisdiction does not exist. The
Monrosa v. Carbon Black, Inc., 359
U.S. 180, 184 (1959). None of the
issues raised here by appellants need
be addressed, given the unchallenged
factual determination central to the
decisions brought here on appeal, and
none of them should be. Rice v.

Sioux City Cemetery, 349 U.S. 70

(1955).*

* As this Court said in that case:

"[t]here is nothing unique about such dismissal even after full argument. There have been more than sixty such cases and on occasion full opinions have accompanied the dismissal. [citations omitted] The circumstances of this case may be different and more unusual. But this impressive practice proves that the Court has not hesitated to dismiss a writ even at this advanced stage where it appears on further deliberation, induced by new considerations, that the case is not appropriate for adjudication." Rice v. Sioux City Cemetery, 349 U.S. 70, 77-79 (1955). And, see footnote 47-48, infra.

Absent such dismissal, this Court should in any case affirm the decisions of the Courts below as being in accord with traditional analyses upholding applications of police power regulations. If it is unwilling to do so, this Court should then remand this proceeding to the Court of Appeals with an appropriate instruction that it reconsider and more clearly articulate in light of traditional analyses the grounds for its decision.

Respectfully submitted,

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The Interests of Amici Curiae

The Municipal Art Society of
New York

The Municipal Art Society of New York has since 1892 dedicated itself to the preservation and improvement of the quality of art and architecture in New York City as a vital aspect of the quality of life itself here. Together with other civic and professional groups, including several of those who join in this brief, the Society initiated and sponsored the study of ways and means to preserve important historic architecture which led to the enactment of the Landmarks Law. The Society considers that the desecration or demolition of Grand Central Terminal in accordance with the owners' plans will do irreparable

harm to the architectural heritage of the City and deprive the people of New York of the extensive public benefits which derive from the continued presence of the Terminal in its present form. It believes that these interests may be protected by enforcement of the Landmarks Law without imposing an undue burden.

The New York Chapter of the American Institute of Architects

The New York Chapter of the American Institute of Architects, established in 1867, is a professional organization of architects in New York County and certain upstate counties. By tradition it has been active in urban planning affairs throughout New York City. Through its Committee on

Historic Buildings it has frequently expressed its opinion on questions concerning application of the Landmarks Law. The New York Chapter of the American Institute of Architects, joins this brief because of the challenge to the validity of landmark preservation laws and because of the threat of demolition of part of New York's heritage, the landmark Grand Central Station.

The Architectural League of New York

Founded in 1881, the Architectural League of New York is a non-profit membership organization sponsoring exhibitions, research projects, lecture series, tours and other cultural events which explore innovative ideas in architecture and the

related art and design fields.

Seeking to provide a forum for the exploration of important issues, the Architectural League sponsors conferences on timely subjects such as: neighborhood preservation with Ralph Nader as keynote speaker, an undergraduate architectural education in a liberal arts college.

In response to interest among its members, the Architectural League also sponsors: The Committee for the Preservation of Architectural Records, and the Archives of Women in Architecture.

The Brooklyn Heights Association

The Brooklyn Heights Association, formed in 1910, is the oldest, largest and one of the most effective

community organizations in the City of New York. The Association was instrumental in the passage of the Landmarks Law and was responsible for Brooklyn Heights' designation as a National Historic Site by the Federal Government in 1964 and as the first Historic District by the Landmarks Preservation Commission in 1965. The Association is committed to the effective implementation and enforcement of the Landmarks Law and it works diligently, in cooperation with the Commission, to achieve such ends.

The unique quality of life in Brooklyn Heights is based in large part on the preservation of the many brownstone homes and other unique buildings which exist in the area. The

preservation of Brooklyn Heights as a unique area of the City is and will continue to be dependent on the existence of the Landmarks Law as an effective instrument to preserve and protect structures in the City such as Grand Central Terminal. The Brooklyn Heights Association firmly believes that the fate of the quality of life in Brooklyn Heights, and in the rest of the City, will be dependent on the fate of the Landmarks Law and Grand Central Terminal.

Citizens Housing and Planning Council

Citizens Housing and Planning Council is a non-partisan citizens' organization which since 1937 has promoted vigorous public and private action for improved city-wide planning,

neighborhood conservation, and better housing conditions, especially for low and moderate income families. CHPC has been especially concerned with the management and use of New York City land and resources. This interest has prompted the organization to assume an active role in issues involving such planning techniques as zoning, landmark preservation and environmental regulation. Citizens Housing and Planning Council membership represents a wide range of interests -- professionals in the fields of housing and planning; social welfare and labor leaders; architects, builders and realtors, civic leaders as well as citizens who are interested in the major planning and development decisions facing New York.

The Citizens Union of the City of New York

The Citizens Union of the City of New York is a non-partisan organization of citizens devoted to improvement of New York's state and local government. Since 1897, it has worked to make New York City a better place for working and living. Through a series of committees, Citizens Union makes recommendations on important issues of public concern. Citizens Union was a leader in the efforts that resulted in the establishment of the Landmarks Preservation Commission and has often served as a civic "watchdog" on landmarks preservation and related issues.

The City Club of New York, Inc.

The City Club of New York, Inc. is a non-partisan, independent organization dedicated to securing permanent good government for the City of New York. Its interest in promoting environmental quality in this City is evidenced in part by its institution of The Bard Awards as an annual program to honor and encourage excellence in architecture and design which includes the preservation and remodeling of existing structures.

The Fine Arts Federation of New York

The Fine Arts Federation of New York was formed to "ensure united action by the Art Societies of New York in all matters affecting their common

interests, and to foster and protect the artistic interests of the community." The Federation is concerned with increasing the use of art in public buildings, administering competitions to ensure its excellence, with safeguarding the interests in artists, protecting and enhancing the city's parks and other open spaces, pressing for beautification of and access to the waterfront, with maintaining a rich architectural mix in our neighborhoods and on our streets, and with preserving significant and beloved buildings erected by earlier generations. The Federation believes that the preservation of Grand Central Terminal has the utmost importance to the City of New York.

The New York Landmarks Conservancy

The New York Landmarks Conservancy is a not-for-profit, tax-exempt organization dedicated to the protection, preservation and continuing use of architecturally, historically or culturally significant buildings in the State of New York and, particularly, in the City of New York. Incorporated in 1973 by a group of preservationists, architects, planners and lawyers, the Conservancy has engaged in a number of studies of important buildings to provide for these structures new and economically feasible uses. The Conservancy aggressively supports responsible preservation efforts and is keenly interested in affirming the Landmarks Law as a means of ensuring,

for posterity, the rich architectural diversity that is the heritage of New York City.

The Preservation League of New York State

The Preservation League of New York State was established in March, 1974 for the purpose, among others, of instilling in the citizens of New York State an appreciation of the educational, historical, architectural and aesthetic significance of their environmental heritage. It is joining in this brief because it believes strongly that Grand Central Station is one of the most distinguished architectural structures of its period and that it adds greatly to the aesthetic and cultural heritage of New

York City. Its destruction would be an inestimable loss.

The Women's City Club of New York, Inc.

The Women's City Club is a civic, educational organization which has been in existence for 60 years and has a membership of 1,000 women, many of whom are top professionals in and out of government. Its purpose is to make New York City a better governed and better city in which to live and work and visit.

The establishment of the Landmarks Commission was a significant step in the attainment of the Club's goals. The Women's City Club has joined as amicus curiae the effort to sustain the decision of the Court of Appeals in the Grand Central Terminal case be-

cause it believes the whole concept of landmark preservation to be at stake.

Preservation Action

Preservation Action is a national organization devoted to the advancement of appropriate legislation for the protection of the historic, cultural, aesthetic and other values inherent in the built Environment.

Preservation Action believes that the outcome of this proceeding will determine for some time to come whether regulation programs to protect those values will be permitted and whether, accordingly it will be possible for government throughout the United States to devise practicable schemes to save our national heritage.

Preservation Action is participating

in this Brief amicus to support the City of New York.

National Center for Preservation Law

The National Center for Preservation Law is a not-for-profit corporation devoted to the understanding and advancement of the range of legal issues inherent in efforts to save the man-made environment. The National Center believes that this case will dispose of one of the issues central to this effort in a way which will be crucial to the future development of the law of preservation. It lends its support to the City of New York because it believes the Landmarks Preservation Law is a responsible regulation, to preserve landmark values, which is constitutional.

The Forty-Second Street Re-
development Corporation

The Forty-Second Street Re-development Corporation is a not-for-profit tax exempt Local Development Corporation mandated by state law to renew the westerly blocks on 42nd Street (8th to 12th Ave.); to upgrade the middle blocks (6th to 8th Avenues); and to then link a strengthened West end to the strong Easterly end of 42nd Street -- creating, in time, a river to river grand boulevard which would become a major source of badly needed revenues and jobs for the City. The corporation was formed in February 1976. Grand Central Terminal is one of the principal visitor attaching on those easterly blocks, and its survival is crucial to the corporation's long range objectives.

The American Institute of Architects

The American Institute of Architects is a national voluntary professional association of 26,000 registered architects in 250 chapters. Established in 1857 as a membership corporation under the laws of the State of New York, A.I.A. is a dynamic force speaking for the entire architectural profession. Through more than one hundred years of activity dedicated to the public interest, the Institute has spoken out and worked for the preservation and active use of America's historic and architectural heritage.

Therefore, the A.I.A., as directed by a resolution voted by its membership in convention, joins

this brief, in support of the validity of landmark preservation laws on the basis of the police power, rather than the power of eminent domain.